Supreme Court, U.S.
FILED
MAY 5 1978
MICHAEL RODAK, JR., CLERK

No. 77-1272

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALFRED VINER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1978. On February 10, 1978, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including March 12, 1978. The petition was filed on March 14, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's convictions.

2. Whether co-conspirator statements were properly admitted against petitioner.

3. Whether the district court should have granted a mistrial because of improper prosecutorial comment on the evidence.

4. Whether the trial court correctly instructed the jury on aiding and abetting.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of distributing heroin, in violation of 21 U.S.C. 841(a)(1), and one count of conspiring to commit that crime, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of five years' imprisonment, followed by a special parole term of three years. The court of appeals affirmed (Pet. App. A).

On July 23, 1976, Officer Wallace Mitchell, a Philadelphia policeman assigned to the Drug Enforcement Administration Task Force as an undercover narcotics agent, arranged to purchase two ounces of heroin from Albert Harrington (Tr. 2-15 to 2-17).[1] The following day Officer Mitchell met Harrington and gave him $2,080. Harrington did not have the heroin; he said that he had to meet someone in front of the Diamond Company Men's Store at Korvette's Shopping Center and that he would have the drugs if Officer Mitchell met him there in ten minutes (Tr. 2-17 to 2-18). Harrington then drove to the shopping center and entered the Korvette's lobby. While Harrington was inside, petitioner drove into

[1]Harrington and petitioner were indicted together. The day before petitioner's trial, Harrington pleaded guilty to the distribution count. He was sentenced to five years' imprisonment and a special parole term of three years.

the parking lot and parked four spaces from Harrington's car. Harrington returned to his car, unlocked the doors on both sides, and sat in the driver's seat. Petitioner soon left his car and entered Harrington's on the passenger side. He was carrying a "reddish pink box, a small box." When petitioner left Harrington's car ten minutes later, he was no longer carrying the box. Petitioner returned to his own car and left the shopping center (Tr. 25-28, 41-44, 2-8 to 2-11, 2-19). Immediately thereafter Harrington met with Officer Mitchell in another area of the parking lot. Officer Mitchell went to Harrington's car and Harrington handed him a pink tissue box that appeared to be the same box carried by petitioner into Harrington's car (Tr. 46, 2-19, 2-43). Harrington told Officer Mitchell that the drugs were inside the box. Beneath the tissues, Officer Mitchell found 49 grams of heroin. He then paid Harrington $200 for arranging the sale. Officer Mitchell saw no similar boxes in Harrington's car (Tr. 2-19 to 2-20, 2-43 to 2-44).

On October 27 and 28, 1976, Officer Mitchell and Harrington agreed to pool their money to purchase approximately four ounces of heroin from "Sonny,"[2] the same supplier who had provided the heroin involved in the July 1976 transaction (Tr. 29-36, 2-23 to 2-26). Officer Mitchell obtained $4,000 of government money and sprayed it with invisible fluorescent ink. He met Harrington on the evening of October 28, and Harrington said that they had to meet Sonny in Philadelphia at 10:00 p.m. They drove together to the parking lot of a diner where the heroin purchase was to take place. Petitioner's car was in the lot. Harrington entered the diner alone and stayed inside for about five minutes. He then returned

[2]Petitioner's nickname is "Sonny" (Tr. 29).

to the car and asked Officer Mitchell for the money he had brought. Harrington reported that the heroin had not yet arrived. He returned to the diner with the money and came back outside after about two minutes. He then crossed the street to a supermarket parking lot where he entered a blue Cadillac driven by his wife. A few minutes later petitioner left the diner and joined Harrington in the blue Cadillac. Surveillance officers arrested both Harrington and petitioner before any drugs were delivered. The government money sprayed with fluorescent ink was found in petitioner's jacket. An additional $3,430 was recovered from the floor of the rear seat of the blue Cadillac. No heroin was found (Tr. 34-38, 2-26 to 2-38).

ARGUMENT

1. Completely apart from the statements of co-conspirator Harrington, the evidence was sufficient to support petitioner's conviction on the distribution count. With respect to the July 24, 1976 transaction, independent evidence showed that Officer Mitchell gave Harrington money for the purchase of heroin. Harrington then met with petitioner, who brought a reddish pink small box to their meeting and left without the box. Immediately thereafter, Harrington delivered a pink tissue box containing heroin to Officer Mitchell. There were no other such boxes in Harrington's car. This evidence alone was sufficient to permit the jury to conclude that petitioner had provided the heroin sold to Officer Mitchell.[3]

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[3] *United States* v. *Pratt*, 429 F. 2d 690 (C.A. 3), and *United States* v. *Tyler*, 505 F. 2d 1329 (C.A. 5), on which petitioner relies, are factually distinguishable. In *Pratt*, the appellant was never observed transferring or carrying anything to his co-defendant but was merely seen in the company of his co-defendant at the time of the sale. In *Tyler*, the appellant was observed carrying a liquor carton to a party. The government introduced no evidence showing that he was aware that the box contained narcotics, and in fact there was substantial evidence that he knew nothing about the box's contents. Here, by contrast, the evidence at trial suggested no exculpatory explanation for petitioner's conduct.

2. The government's evidence of petitioner's participation in a criminal conspiracy with Harrington was sufficient to sustain petitioner's conviction on the conspiracy count and to permit the introduction of Harrington's statements. In addition to his involvement in the July 1976 episode, petitioner played a visible role in the aborted October 1976 heroin transaction. In October, as in July, Officer Mitchell gave Harrington money to buy heroin. Again, as in July, Harrington promptly met with petitioner, and he transferred the government money to him. Although no heroin was actually transferred in October, Harrington named petitioner as his source for both sales.

Petitioner contends (Pet. 23-27, 48-50) that Harrington's statements identifying petitioner as his source should not have been admitted at trial. But statements by co-conspirator Harrington "during the course and in furtherance of the conspiracy" are not hearsay, and are therefore admissible, provided the government has made "a sufficient showing, by independent evidence" that petitioner conspired with Harrington to distribute heroin. Fed. R. Evid. 801(d)(2)(E); *United States* v. *Nixon*, 418 U.S. 683, 701; *Anderson* v. *United States*, 417 U.S. 211, 218-219; see also *Glasser* v. *United States*, 315 U.S. 60, 74-75. Here the government showed that in July 1976 petitioner delivered to Harrington a box containing heroin and that Harrington then sold the heroin to Officer Mitchell. The government also showed that in October 1976 petitioner received the $4,000 that Officer Mitchell had given to Harrington in order to purchase more heroin. These showings provided adequate foundation for the introduction of Harrington's statements.

Nor did the admission of those statements deprive petitioner of his Sixth Amendment right to confront the witnesses against him (see Pet. 61-63). The challenged statements fell squarely within the co-conspirators' exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E).[4] This Court has acknowledged that the hearsay rule and the Confrontation Clause are designed to protect similar values (see *California* v. *Green*, 399 U.S. 149, 155-156; *Dutton* v. *Evans*, 400 U.S. 74, 86) and has never found a Confrontation Clause violation where disputed statements were admitted under the federal co-conspirators' exception. See also *Ottomano* v. *United States*, 468 F. 2d 269, 273 (C.A. 1), certiorari denied, 409 U.S. 1128; *United States* v. *Clayton*, 450 F. 2d 16, 19-20 (C.A. 1), certiorari denied, 405 U.S. 975; *United States* v. *Addonizio*, 451 F. 2d 49, 71 (C.A. 3), certiorari denied, 405 U.S. 936; *United States* v. *Leonard*, 494 F. 2d 955, 968-970 (C.A. D.C.).

3. Petitioner contends (Pet. 51-54) that the district court should have declared a mistrial because of improper prosecutorial comment during summation. The remarks about which petitioner complains are contained in the following exchange dealing with events in the diner parking lot in October 1976 (Tr. 2-99 to 2-100):

> [THE PROSECUTOR]: Again, the government is satisfied with you as jurors to decide this case not based on speculation, not based on guesswork, but based on your logical common sense as to what was going on.

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[4]Harrington's statements to Officer Mitchell that petitioner was the source of his heroin were intended to explain why Officer Mitchell had to travel to certain locations (the Korvette's parking lot and the Philadelphia diner) in order to obtain the narcotics he wished to purchase. The statements were thus "in furtherance" of the criminal conspiracy.

> It is very obvious there was heroin in here—
>
> [DEFENSE COUNSEL]: I object to what the government thinks, Your Honor.
>
> [THE PROSECUTOR]: As an advocate, and I am not invading the province of the jury, believe me, it's up to you, but we think—
>
> [DEFENSE COUNSEL]: I object again and move for a mistrial.
>
> THE COURT: This is what you think the evidence proves.
>
> [THE PROSECUTOR]: What I think the evidence proves is that there was heroin in here and that [petitioner] transported it to the car, that he knew about it, that he was arranging to make a second transaction which had not occurred yet at the time he was dealing with the money, which could not be counted in a short period of time.

Earlier, the prosecutor had advised the jury that "it will be your decision to make on what the facts are in this case because what I say are not the facts * * *. * * * [I]t is your collective remembrance of the evidence that is going to control" (Tr. 2-65 to 2-66). And the trial court admonished the jury that "[t]he speeches of the lawyers are not part of the evidence and you should not consider them as such. * * * [Y]ou are not required to accept the arguments of either lawyer. It is for you and you alone to decide the case based on the evidence as it was presented from the witness stand and in accordance with the instructions which I am now giving you" (Tr. 2-107 to 2-108). The prosecutor's single comment on what he thought the evidence proved was not improper and, even if it were, would not require declaration of a mistrial under these circumstances.

4. Although he raised no objection at trial, petitioner now argues (Pet. 54-60) that the district court's instruction on aiding and abetting was erroneous. Rule 30, Fed. R. Crim. P., provides that "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict * * *." Having made no such objection, petitioner is precluded from pursuing the matter in this Court. Moreover, the district court's instructions were entirely proper. The court stated (Tr. 2-110 to 2-111):

> In the case where two or more persons are charged with commission of a crime the guilt of one of the defendants may be established without proof that he did every act constituting the offense charged because there is another statute of the United States which says whoever aids or abets, counsels, commands or procures the commission of an offense is punishable as a principal.
>
> So whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.
>
> So even though there may not have been a distribution by [petitioner], if you find he aided and abetted or counseled or procured the commission of the offense by someone else, then, of course, he could be indicted and tried and found guilty as a principal.

This charge accurately informed the jury of the principle embodied in 18 U.S.C. 2, namely, that an aider or abettor is guilty as a principal. See, *e.g.*, *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-620.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1978.

DOJ-1978-05